SUPREME COURT, U. S.
No. 73-458

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In the Supreme Court of the United States

OCTOBER TERM, 1973

FRANCIS ANTHONY RAGUSA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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An indictment filed in the United States District Court for the Southern District of California charged petitioner with unlawfully importing 167 pounds of marihuana and possession of that marihuana with intent to distribute it, in violation of 21 U.S.C. 960 and 841(a). After a non-jury trial, petitioner was acquitted on the importation count and convicted on the possession count. He was sentenced to imprisonment for 90 days, to be followed by probation for three years. The court of appeals affirmed (Pet. App.).

The pertinent evidence, adduced at a pretrial hearing on petitioner's motion to suppress and at trial, showed that at 3:05 a.m. on July 9, 1972, a rented vehicle driven by petitioner and containing a female passenger appeared at the established Border Patrol checkpoint lo-

cated five miles south of San Clemente, California (Tr. 11-12).[1] Petitioner was referred to a secondary search area, manned by Border Patrol officers Falkowski and Holman. At the officers' request, petitioner opened the trunk of the car, which contained four suitcases. Falkowski asked petitioner if he was travelling, and he responded that he was on his honeymoon. Falkowski then walked to the front of the car and asked the passenger if she was married; the woman replied that she was not (Tr. 13-15).

The four suitcases were stacked in such a manner as to cover the full width of the front of the trunk, leaving a large gap (about two feet deep, two feet high, and four to five feet wide) between the back of the suitcases and the rear seat of the vehicle (Tr. 22-24). Using a flashlight, Officer Holman attempted to examine the rear space for the presence of aliens. In order to do so, he bent down into the trunk and positioned his head next to the suitcases to enable him to peer into the rear space, with his head "an inch or less" from one of the suitcases (Tr. 24-30). At this point, Holman detected the distinct odor of marihuana emanating from the inside of that suitcase (Tr. 24). Petitioner was asked to open the suitcase and declined to do so. The agent then opened it and discovered bricks of marihuana inside (Tr. 25). The remaining suitcases were opened, and the agents counted a total of 73 one-kilogram bricks of marihuana (Tr. 28-29).

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[1] "Tr." designates the transcript of the proceedings before the district court, a copy of which we are lodging with the Clerk of this Court.

After he was arrested and advised of his *Miranda* rights, petitioner was transported to the San Diego City Jail. En route, petitioner asked customs agent Ron Lacey how many kilos had been found in the suitcases. When Lacey replied that there were 73 kilos, petitioner remarked, "There's three missing" (Tr. 46). Later, the bricks were recounted, and the number seized was in fact determined to be 76 (Tr. 47).

1. Relying upon *Almeida-Sanchez* v. *United States*, No. 71-6278, decided June 21, 1973, petitioner claims that the warrantless search of his suitcases at the San Clemente checkpoint was unlawful.[2] The court of appeals, however, correctly concluded that *Almeida-Sanchez* does not control this case. This Court there held unlawful a search conducted pursuant to a roving patrol on a deserted east-west road "that lies at all points at least 20 miles north of the Mexican border" (slip op. 7). By contrast, petitioner's vehicle was stopped at a permanent Border Patrol checkpoint on Interstate Route 5, a well-travelled highway which has long carried a large proportion of the traffic between Tijuana, Mexico, and Los Angeles. See *Fernandez* v. *United States*, 321 F. 2d 283, 286 (C.A. 9). *Almeida-Sanchez* did not "involve the constitutional propriety of searches at permanent or temporary check points removed from the border or its functional equivalent" (slip op. 2, Powell, J., concurring). The routine checkpoint stop in this case, unlike a warrantless roving patrol stop, did not occur on a lonely road without warning to the motorist, and it did not present a substantial risk that the Border Patrol officers

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[2] The government has never asserted that the search of the suitcases was premised upon petitioner's consent. Thus, there is no need to consider his argument (Pet. 12-15) that he did not consent to the search.

would abuse their "unfettered discretion" (*Almeida-Sanchez*, slip op. 4). Nor has petitioner claimed that there was any such abuse.

Once the vehicle had been stopped by the officers, pursuant to their authority under 8 U.S.C. 1357(a) to conduct warrantless searches of automobiles for illegal aliens within a reasonable distance of the border, the officers acted reasonably in inspecting the trunk after receiving inconsistent responses from petitioner and his passenger. They also acted reasonably in looking into the large space created by the unorthodox stacking of the suitcases. It was while in the proper course of checking that space for the presence of concealed aliens that officer Holman detected the odor of marihuana, which in turn clearly gave him probable cause to believe that an offense was being committed. The search of the suitcases was therefore proper.[3]

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[3] Moreover, even if the ruling in *Almeida-Sanchez* applies to permanent checkpoint stops, there is no reason to apply it retroactively to searches that occurred prior to the date of the decision. The case involved a new application of the Fourth Amendment's exclusionary rule, which is designed, not to ensure a "'fair determination' of * * * guilt or innocence" (*Roberts* v. *Russell*, 392 U.S. 293, 294) or to preserve the "integrity of the fact-finding process" (*Linkletter* v. *Walker*, 381 U.S. 618, 639), but to deter unlawful police conduct. Applying the decision retroactively would serve no deterrent purpose.

Although no prior Supreme Court decision was overruled in *Almeida-Sanchez*, the Border Patrol had for many years made vehicular stops on roving patrols and at established checkpoints pursuant to statutory authority (8 U.S.C. 1357(a)), and the courts of appeals had uniformly upheld the validity of those practices. In these circumstances, this Court's retroactivity decisions make clear that *Almeida-Sanchez* should operate only prospectively. See, *e.g.*, *Desist* v. *United States*, 394 U.S. 244; *Williams* v. *United States*, 401 U.S. 646. Cf. *Michigan* v. *Payne*, No. 71-1005, decided May 21, 1973.

2. Petitioner also claims that the statement he made while being transported to the San Diego Jail should not have been received in evidence, because it was made after he had expressed his desire to remain silent. We note that petitioner did not challenge the admissibility of this statement in the lower courts. In any event, petitioner himself initiated the conversation and freely made the incriminating statement after the officer answered his question. Petitioner's Fifth Amendment rights were in no way compromised. See *United States* v. *Anthony*, 474 F. 2d 770 (C.A. 5).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1973.

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